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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

Nos. 141-154

HILARY HALBERT, JR., ET AL., PETITIONERS,

vs.

UNITED STATES.

PETITIONERS' REPLY BRIEF.

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Respondent's brief raises questions here conceded in one or both of the courts below. These and other questions raised, while harmless when properly understood, require explanation. Hence this reply.

Counsel for respondent (Brf., pp. 4-5) here present six questions for decision which will be considered in the order stated:

First Question.

"Whether members of the Chehalis, Chinooks and Cowlitz tribes of Indians are entitled to allotments upon the Quinaielt Reservation?"

In the trial court (R., 421) counsel stipulated "that the Lower Chehalis tribe of Indians are entitled to allotments on the Quinaielt Reservation". In the appellate court below, counsel made similar concession (R., 667), while counsel here submit the question as to the rights of the Chehalis, as well as the Chinook and Cowlitz tribes to the court (Brf., p. 21). This submission is followed by an argument (Brf., pp. 21-5) designed to exclude the members of all three tribes from allotments.

The rights of the Chehalis, Chinook and Cowlitz Indians to allotments on the Quinaielt Reservation are dependent upon (1) the proper construction of the Executive Order of 1873 (R., 299-300) and (2) the Act of March 4, 1911 (R., 300-301).

By the Quinaielt-Quillehute Treaty of 1855-6 (Resp. Brf., Appx. A), hereinafter referred to as "the Treaty", it was agreed, by Article 2, that a tract or tracts of land "sufficient for their wants" should be selected by the President, surveyed, located and set apart "for their exclusive use", and, by Article 6, defendant agreed to expend the sum of $2,500.00 for their removal and settlement on the reserve. Nothing was done toward the establishment of a reservation under the treaty until 1863, when a tract of land comprising about 10,000 acres around the mouth of the Quinaielt River was surveyed (R., 436, 442). This tract was never specifically set aside by Executive Order (R., 311), nor was any appropriation ever made for the removal of the Indians. By Article 6 (Resp. Brf., Appx. A., p. 3) the President was authorized, in his

discretion, to remove the Indians from the reservation, for which provision had been made by Article 2, and to locate them upon another and different reservation and to there consolidate them with other tribes.

Nothing having been done, the Superintendent of Indian Affairs for Washington Territory, in 1865 (R., 297-9, 469) recommended to the then Secretary that the reservation surveyed for the Quinaielt and Quillehute Indians, and embracing 10,000 acres of land, be enlarged so as to include approximately 224,000 acres for the use of not only the Quinaielts and Quillehutes, parties to the treaty, but also for the use of the "*remnants of the Chehalis, Humptulups, Shoalwater Bay and Chinook tribes*", which he stated "are emphatically fish eaters and draw their subsistence almost wholly from the water and therefore have but little taste or desire for agricultural or land production." Attention is invited to that portion of the report upon which the Order was based appearing in the record (R., 297-9). Attention is further invited to the fact that the remnant Cowlitz tribe, which is not specifically named in the Superintendent's report (R., 297-8), had, at the time of the Executive Order of 1873, been merged with the Chehalis tribe, the Cowlitz Indians in 1885 being no longer known by that name (Bu. Am. Ethn., Bul. 30, Pt. 1, p. 355).

Acting upon said report, the President, on November 4, 1873, issued an Executive Order (R., 299-300) as follows:

> "In accordance with the provisions of the treaty with the Quinaielt and Quillehute In-

> dians" * * * "and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory" * * * "be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and *other tribes of fish-eating Indians on the Pacific Coast.*"

Counsel for respondent (Brf., p. 25) contend:

> "The broad language in the Executive Order, 'other tribes of fish-eating Indians on the Pacific Coast', might well be construed to include only such other tribes as were in the immediate locality, under the principle of *ejusdem generis*, particularly since the Order itself uses the phrase, 'other Indians *in that locality*'."

Counsel for petitioners submit that such a construction would limit benefits on the reservation to the Quinaielts, whose rights were secured by the treaty, as the Quinaielts claimed the possessory title to the land immediately surrounding the reservation, as will appear from the map accompanying the brief of counsel for respondent, and would thus render meaningless the words "other Indians", as there was no *other* Indians who held possessory title to any of the land immediately surrounding the reservation. Such a construction would also render meaningless the words appearing in the last portion of the Executive Order, "and other tribes of fish-eating Indians on the Pacific Coast". The word "on" was here used in its enlarged, not restricted sense, as none of the Indian settlements were located immediately on the "Pacific

Coast'' but were located on the rivers and streams flowing into the Pacific Ocean, the harbors and lakes as they are today.

That petitioners come within both designations "other Indians in that locality'' and "other tribes of fish-eating Indians on the Pacific Coast'' appears plain from respondent's brief, pages 12 and 13.

Nowhere in the record, nor in the briefs now before the Court, does the legislative history of the Act of March 4, 1911, appear. While the official documents shed but little light on the intent of Congress, they do shed some light upon its evident purpose. Counsel for petitioners feel justified, even at this late day, in fairness to the Court, in bringing to its attention the legislative history of this Act.

Senate Bill 5269 (R., 641-3), which later became the Act of March 4, 1911, was introduced in the Senate January 13, 1910 (Cong. Rec., Vol. 45, Pt. 1, p. 577), and provided as follows:

> "That the Secretary of the Interior be, and he is hereby, authorized and directed to allot on the Quinaiult Reservation, Wash., under the provisions of the allotment laws of the United States, all members of the Hoh, Quileute, and Ozette tribes of Indians in Washington who may elect to take allotments on the Quinaiult Reservation rather than on the reservations set aside for these tribes: *Provided*, that the allotments authorized herein shall be made from the surplus lands on the Quinaiult Reservation after the allotments to the Indians thereon have been completed.''

Upon this bill the Department, under date of February 18, 1910, submitted a report (R., 641-3). The Senate Committee on March 1, 1910, reported S. 5269 without amendment, Report No. 300 (Cong. Rec., Vol. 45, pt. 3, p. 2540). The report contains five lines and offers no explanation of the bill other than that contained in the Departmental report of February 8, 1910, which was printed as an appendix. March 9, 1910, S. 5269 was passed by the Senate without amendment and without discussion (Cong. Rec., Vol. 45, pt. 3, p. 2951). The bill then went to the House Committee. On February 11, 1911, the House Committee reported the bill to the House without amendment, accompanied by a report, No. 2152 (Cong. Rec., Vol. 46, pt. 3, p. 2391). This report contains five lines, and offers no explanation of the bill, other than that appearing in the Departmental report which is printed as an appendix. March 2, 1911, the bill was considered in the House and amended to read as it appears in the Statute, except that the word "were" appears in the place of the word "are" before the word "affiliated" (Cong. Rec., Vol. 46, pt. 4, p. 3937). No explanation was offered on the floor of the House of any amendment. On the same day, to-wit, March 2, 1911, (Cong. Rec., Vol. 46, pt. 4, p. 3891,) the Senate concurred in the House amendments, there being no discussion nor explanation offered. Although the bill as it passed the House contained the word "were" before the word "affiliated", the Senate struck out the word "were" and inserted the word "are", which was evidently upon the assumption that the House had stricken out the word

"were" and inserted the word "are", as the Senate was concurring in the House amendments. It would therefore appear that the word "are" should be construed as "were", for only by such construction can it be given any meaning.

The amendments made to the bill in the House, and later concurred in by the Senate, were: after the word "Ozette" and before the word "tribes" appearing in the bill as originally introduced and as it passed the Senate, the words "or other" were inserted; and after the word "who" the following words were inserted:

> "are affiliated with the Quinaielt and Quillehute tribes in the treaty of July 1, 1855 and January 23, 1856 and who."

It would therefore appear that the clause

> "who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes"

was intended to relate to the Hoh, Quileute and Ozette tribes for whom the three little reservations had been set aside, and was not intended to have any relation to the

> "other tribes of Indians in Washington who are affiliated with the Quinaielt and Quillehute tribes in the treaty of July 1, 1855 and January 23, 1856."

It would also appear that Congress, by the amendment inserting the words

> "other tribes of Indians * * * who are affiliated with the Quinailet and Quillehute tribes in the treaty."

intended to confer benefits upon those tribes for whom no reservations had been set aside, but who were embraced within the terms of the Executive Order. It would further appear that Congress by the amendment had in mind the treaty convention held at Cosmopolis in February, 1855, in which the Chehalis, Chinook and Cowlitz Indians participated (Pet. Brf., 17), which convention appears to have been the only conference held with any of the Indians prior to the actual signing of the treaty on July 1, 1855, on the Quinaielt River by the Quinaielts, and the actual signing of the treaty at Olympia by the Quillehutes on January 25, 1856. An examination of the certified copy of the draft of the treaty made at Cosmopolis (which is on file with the Court) will disclose that its text is substantially identical with the treaty as signed by the Quinaielts and Quillehutes, except as to the description of the land to be ceded, the signatory parties and dates. It would therefore appear that Congress in using words appearing in the Act of March 4, 1911, viz., "who were affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, 1856", had in mind the conference at Cosmopolis in which the Chehalis, Chinook and Cowlitz Indians participated.

While the trial court did not have before it the legislative history of the bill that became the Act of March 4, 1911, it reached the same conclusion (R., 331-7), to which the special attention of this Court is invited.

As so construed, every part of the Act is given force and effect, and, counsel submit, effectuates the evident intent and purpose of Congress, which was to provide allotments for all Indians for whose use the reservation was set aside by the Executive Order.

Following the Act of March 4, 1911, a question arose as to the right of the "Clallam, Cowlitz, Squaxion Island, Port Gamble, Hoh, Ozette, Quileute and other fish-eating Indians in the State of Washington" to allotments on the Quinaielt Reservation under the treaty, Executive Order, and Act of March 4, 1911. To clarify the situation a bill was introduced in the House directing allotments to said Indians. Under date of January 14, 1913, (R., 320-21; Resp. Brf., pp. 28-9,) the Indian Bureau advised:

> "In view of the treaties, executive orders, and acts hereinbefore set forth, it is believed that the Indians referred to in the pending bill may be allotted on the Quinaielt Reservation and that further legislation is unnecessary."

Under date of September 2, 1916 (R., 295) the Solicitor for the Department, after a review of the entire situation (R., 324), affirmed the action of the Indian Bureau. Prior to the letter of the Indian Bureau a large number of Chehalis, Chinook and Cowlitz Indians had been allotted on the Quinaielt Reservation. Of the 1,414 Indians now allotted on that reservation more than half are Chehalis, Chinook and Cowlitz Indians, the Quinaielts and Quileutes having heretofore been all, or substantially all, allotted. There is no question as to available land to allot all "fish-eating Indians on

the Pacific Coast" as the reservation is susceptible of more than 800 additional allotments, and the allotment work is now reaching completion.

Second Question.

> "If so, whether the petitioners, or any of them, are Chehalis, Chinook or Cowlitz Indians."

This question is considered by counsel for respondent (Brf., pp. 29-38) with reference to pages 14 and 15.

The principal objection of counsel for respondent (Brf., 29) to the decrees of the trial court in cases No. 141 to 151, both inclusive, appears to be based on the quantum of petitioners' Indian blood. The quantum of Indian blood, except in cases arising under special laws, has never been determinative of a right to share in tribal property and has no application to any case now before the court. Apparently for this reason there is no direct testimony in the record in any of the cases of the quantum of Indian blood of any of petitioners or their ancestors, except in certain cases where their mothers or grandmothers or great-grandmothers were full bloods. There is evidence in the record showing the white ancestry of each of petitioners from which a deduction may be reached as to whether white or Indian blood predominates. For the information of the Court it may be stated that in cases numbered 145, 147 and 148 petitioners have approximately three-fourths or more Indian blood; in cases numbered 141, 142, 143 and 144 they possess one-eighth or more Indian blood, and in the remainder of the cases they are

approximately one-half Indian blood. All of which counsel for petitioners submit is immaterial, the basic rights to an allotment depending upon (1) membership in a tribe, or (2) rights of Indians and their children protected by remedial Acts. *U. S. vs. Wildcat*, 244 U. S. 111, at 119; *McDougal vs. McKay*, 237 U. S. 372, at 383; *Oakes vs. U. S.*, 172 Fed. 305.

Counsel complain that the Bills allege that plaintiffs are members of the "Quinaielt tribe", whereas the proof shows, and the trial court found, them to be Chehalis, Chinook and Cowlitz Indians. Since these defects may be cured by amendments, and nothing is to be gained by sending the case back for that purpose, this Court will consider the amendments made, and dispose of the cases (*Realty Holding Co. v. Donaldson*, 268 U. S. 398, at 500, and cases therein cited).

CASES NO. 141, 142, 143, 144, 145, 147, 148 AND 154.

Counsel then concede (Brf., pp. 29, 14, 15) that the District Court found petitioners in these cases (Brf., p. 14) to be members by blood of the Chehalis, Cowlitz or Chinook tribes. Counsel admit (Brf., p. 19) that no objection was made to the introduction of evidence upon which the finding was based and further admit (Brf., p. 30) that no error specifically challenging the findings of the trial court was assigned. The appellate court below, and counsel for respondents here, concede the facts as found by the trial court. It was, however, contended in the appellate court below, and for the first time, and the contention is renewed here by

counsel for respondent (Brf., p. 30), that in view of the fact that the opinion of the District Court set out the lineage of each person, it is permissible on the state of the record to contend that the facts as found by the trial court were not sufficient to support its findings that petitioners were members of said tribes.

The appellate court below, or this Court, may notice a plain and serious error of the trial court, appearing on the face of the record, but on the records before the appellate court below, and this Court here, no such error appears to have been committed to the injury of respondents. The error claimed by counsel for respondent is that the records show that the grandfathers, or great-grandfathers, of petitioners were white men who married Indian women members of the Chehalis, Chinook or Cowlitz tribes; that by law the children of such marriages took the status of their white fathers and were white people, citizens of the United States, and the status of petitioners, their issue, is that of white people, citizens of the United States, and not members of the Chehalis, Chinook and Cowlitz tribes. It may be conceded by counsel for petitioners that such is the general rule announced and followed by the courts, but to this general rule there is a well recognized exception, ignored by the appellate court below and by counsel for respondent here, which when applied to petitioners removes all basis for the claimed error relied upon by respondents. The Court will observe that nowhere in respondent's brief is the date of the marriage of the white man to the Indian woman stated (Brf., pp. 29-38). In every such in-

stance the marriage occurred prior to 1870, at which time, and apparently at all times prior to August 9, 1888, the Indian woman retained her status as a tribal Indian, particularly where she remained with her tribe; and, depending upon tribal laws and customs, the white man may or may not, by reason of his marriage to the Indian woman, have become a member of the Indian tribe of his wife. The first act designed and intended to put an end to the acquisition of tribal membership by white men marrying Indian women, and the first act that declared the status of an Indian woman marrying a white man to be that of a citizen of the United States, was the Act of August 9, 1888 (25 Stat. 392), which provided as follows:

> "That no white man, not otherwise a member of any tribe of Indians, who may hereafter marry an Indian woman, member of any Indian tribe in the United States, or any of its Territories, except the five civilized tribes in the Indian Territory, shall by such marriage hereafter acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.
>
> "That every Indian woman, member of such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges and immunities of such citizen, being a married woman:
>
> "*Provided*, that nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein."

It will be observed that this Act dealt with the future and was not retroactive. It did not attempt to disturb the tribal status of a white man theretofore acquired by marriage to a tribal Indian woman nor the tribal status of an Indian woman theretofore married to a white man nor did it deal with the rights of children born of such a marriage thereafter occurring.

Following the Act of 1888 a question as to the rights of children born to Indian women marrying white men subsequent to the Act of 1888 to share in tribal property arose. To make definite and certain the status of such children, Congress enacted the Act of June 7, 1897 (30 Stat. 90), which provided as follows:

> "That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right." (Pet. Brf., 172.)

It is the contention of counsel for respondent that the Act of June 7, 1897, definitely fixed the status of all children born of a marriage of an Indian woman and white man at any time theretofore as that of white citizens of the United States and that only the children of such a marriage could acquire rights in tribal property which did not extend to their children. Accord-

ingly, counsel for respondent contend that, as petitioners are the grand or great-grandchildren of such marriages they could not be possessed of an allotment right. It is the contention of counsel for petitioners that the Act of June 7, 1897, was designed to enlarge, not restrict rights, and did not affect nor disturb the status of Indian women and their children as members of Indian tribes existing prior to the Act of August 9, 1888. The Act of June 7, 1897, has been before the lower courts for construction in *Oaks et al. v. U. S.*, 172 Fed. 305; *Vezina v. U. S.*, 245 Fed. 411; *Pape v. U. S.*, 19 F. (2d) 219; *Smith v. Bonifer*, 154 Fed. 883, and other cases, in none of which does the question here raised appear to have been decided. Certainly the question does not appear to have been decided by this Court. In the case of *Vezina v. U. S.*, 245 Fed. 411, in which the marriage occurred prior to 1875, the court at page 420 calls attention to the fact that at that time the Indian woman was under the control of the United States, who recognized no authority over her but its authority, and added:

> "The court should not find upon light and trifling circumstances that an Indian has forfeited his citizenship in his tribe and in no method acquired any other citizenship, but has become literally a man without a country. It should take especially strong evidence that an Indian woman has abandoned her tribe simply by living with her husband, which she ought to do by the laws of both God and man."

The courts uniformally recognize an exception to the rule adhered to by the appellate court below and in-

sisted upon by counsel for respondent. That exception is stated in *Smith v. Bonifer*, 154 Fed. at 889, as follows:

> "The rule sustained by the weight of authority is that the status of half-breed Indians, the offspring of an Indian woman married to a white person, follows the condition of the father. To this there is an exception which obtains where the mother remains with her tribe, retaining the nurture of the children, when abandoned by the husband and father. In such cases the children become of tribal affiliation with the mother. 22 Cyc. 112; United States *v.* Hadley (C. C.), 99 Fed. 437; United States *v.* Higgins (C. C.), 103 Fed. 348; Farrell *v.* United States, 110 Fed. 942, 49 C. C. A. 183."

Such of petitioners' mothers or fathers as were born of marriages of tribal Indian women to white men, or are the issue of such marriages, were born in tribal environment, as were petitioners. In view of this situation the trial court held petitioners to be members of the Chehalis, Chinook and Cowlitz tribes. Neither the appellate court below, nor counsel for respondent here, question the tribal environment in which petitioners and their ancestors were born and lived, as found by the trial court, and as this finding brings petitioners within the exception to the general rule, it would appear that no error by the trial court appears on the face of the record and that there is no substance to the objection raised.

CASES NOS. 146, 149, 150 AND 151.

As to the claimants in these four cases counsel for respondent contend (Brf., 15) that the trial court made no specific findings as to the blood of petitioners, and therefore they are not entitled to allotments. These four cases in the trial court were numbered respectively 312, 324, 325 and 326 (Resp. Brf., 6; R., 340-3). The trial judge (R., 342) says in his opinion:

> "The facts in these four cases do not distinguish them from the decision reached by this court in case No. 272-E of the causes in this court. In that case the court decided that the mother of the plaintiffs in the present case No. 326 and the fathers in the other three cases and Agnes Elliott, the grandmother of plaintiffs in all such cases, were entitled to allotments on this reservation."

Defendant prosecuted no appeal from the decision of the trial court in case No. 272-E, nor did it incorporate in the record the decision of the trial judge in that case, which is indispensable to a proper understanding of the finding of facts by the trial court in these four cases. In the absence of the decision it is to be presumed that the trial court found the Indian tribal blood of petitioners' ancestors as appears in the findings in other cases before this Court, and found them to be of the blood of one of the tribes held by the trial court to be entitled to allotments on the Quinaielt Reservation. As the finding of facts by the trial court in all the cases now before this Court were not questioned

by the appellate court below, nor by counsel for respondent here, it would appear that this objection is without merit.

The decrees of the trial court in all of the above cases, viz, cases numbered 141 to 151, both inclusive, were reversed by the appellate court below solely on the ground that residence on the Quinaielt Reservation was a condition precedent to the right to an allotment, which will be later shown, under the third question, to have been error.

Third Question.

> "Whether residence upon the Quinaielt Reservation or upon some other reservation is a prerequisite to allotment upon the Quinaielt Reservation."

This question is dealt with by counsel for respondent in their brief, pp. 38-49. The trial court (R., 331) held that the rights of petitioners to allotments were governed by the Act of March 4, 1911 (Resp. Brf., Appx., p. 9), and the Executive Order of November 4, 1873 (R., 299-300), which correctly states the position of counsel for petitioners.

It plainly appears from the legislative history of the bill that became the Act of March 4, 1911, that the original bill as introduced authorized allotments to all members of the Hoh, Quileute and Ozette tribes for whom reservations had been "set aside," and contained no reference to residence other than that allotments should be made under the "allotment laws of the United States," which were apparently intended

to govern allotments in all respects except as to residence. The Department in its report on said bill (R., 641) advised Congress that the Quinaielt Reservation had been set aside by the Executive Order of November 4, 1873, in pursuance of the treaty of July 1, 1855, "and reserved for the use of the Quinaielt, Quileute, Hoh, and other tribes of fish-eating Indians of Washington." The Department expressed the opinion in the report (R., 642-3) "that those members of the Hoh, Ozette and Quileute Indians who are *residing on* the separate reservations set aside for them should receive allotments on the Quinaielt Reservation, and would be glad to see S. Bill 5269 enacted into law."

Thus while the Department expressed the opinion that the members of the tribes mentioned who were residing on the separate reservations set aside for them should receive allotments on the Quinaielt Reservation, it made no objection to allotments to all members of said tribes *for whom reservations had been set aside.* This was but natural in view of the physical conditions existing. In 1910, 746 allotments had been made on the Quinaielt Reservation (R., 437) and less than 200 Indians resided thereon and but few others resided on any existing reservation. Only a part of the Hoh, Quileute and Ozette Indians then resided on the little reservations set apart for their use. The Department had not been requiring residence as a condition precedent to allotment. This situation was known to the Department and was presumed to have been known to Congress when it enacted the Act of March 4, 1911, *Hy-yu-tse-mil-kin v. Smith,* 194 U. S. at

412, and it would appear that residence on either one of the little reservations or on the Quinaielt Reservation as a condition precedent to allotment was designedly omitted from the Act of March 4, 1911. The appellate court below (R., 641-3) took an erroneous view of the Departmental report, and upon this erroneous view based its opinion.

Had not the Act of March 4, 1911, directed allotments to be made

> "under the provisions of the allotment laws of the United States"

the intent of said Act would be clear. The appellate court below, and counsel for respondent here, have considered the General Allotment Act as the only applicable allotment law, completely overlooking and ignoring the evident intent of the Act of 1911, and further, article 6 of the treaty of 1855-6 (Resp. Brf., Appx. 3), which authorizes the President at his discretion to

> "cause the whole or any portion of the lands * * * to be surveyed into lots, and assign the same to such individuals or families *as are willing to avail themselves of the privilege, and will locate on the same as a permanent home.*"

It will be observed that allotments were to be made to persons who "*will* locate on the same as a permanent home." The location could be made after the allotment, no time being fixed. In the cases of petitioners, they can not locate on an allotment until it is made, otherwise they would be trespassers. In each

of the bills there is a paragraph similar to the (R., 25, par. 9) following:

> "That said plaintiff is entitled to have said land so selected allotted to him, and desires that the same be allotted to him, and that his rights be recognized and that he be permitted to go upon, live upon, cultivate and improve said land as his home."

Physical conditions precluding residence on the allotments until the timber is removed, petitioners contend that, when they have signified their intention and evidence their willingness to go upon the land when allotted them and the timber is removed, they have fully complied with the allotment laws.

The Department, certainly in practice, has not construed the Act of 1911 as requiring residence as a condition precedent to allotment. This is evidenced by the fact that, of the 1,414 Indians allotted, only 6 reside on their allotments and only 200 on the reservation, and is further evidenced by the letter of the Secretary to the Attorney General in the case of the children of Frank C. Mounts (Pet. Brf., 178-9), and by the Departmental letter dated June 13, 1930, appearing on page 45 of respondent's brief.

No question of residence as a condition precedent to allotment was raised in the trial court.

Fourth Question.

"Whether the children of a white man and an Indian woman, the latter being a member of the

Quinaielt tribe by adoption but not by blood, are entitled to allotments upon the Quinaielt Reservation."

CASE No. 152:

Counsel for Respondent (Brf., 37) concede that if Chinook Indians are entitled to allotments that petitioners in this case are so entitled. As counsel for petitioners have hereinbefore, in answering Question One, made plain the right of the Chinook Indians to allotments on the Quinaielt Reservation, the decree of the Circuit Court of Appeals should be reversed, and the decree of the trial court affirmed.

Fifth Question.

"Whether the Act of June 7, 1897, applies to the granchildren of a white man and an Indian woman."

This question is considered in respondent's brief, pp. 52-7, and deals with case No. 153, Lizzie Rolfson *et al.* The finding of the trial court appears in the record, pp. 361-4, to which reference is here made. The trial court found (R., 362) that Lizzie Rolfson, principal claimant, was born in 1870 in tribal environment, of a marriage theretofore of a Chehalis Indian woman to a white man; that she had lived "the greater part of her life at Hoquiam, near Grays Harbor"; that "her residence among and association with these Indians as well as the residence and association of her mother are sufficient to show her membership in the Chehalis tribe of Indians, in view of the fact that it has long had no tribal organization," thus bringing her

case within the ruling in *Smith v. Bonifer, supra.* The court held that she was entitled to an allotment in her own right as a Chehalis Indian (R., 364). The court further found that she was married in 1887 at Montesano, in Grays Harbor County, and divorced ten years lated. Of this marriage two sons Eugene and Alvin Smith were born. As to them the court found (R., 663-4):

> "Eugene Smith and Alvin Smith, being children of an Indian woman, by blood and not by adoption, married to a white man prior to the Act of June 7, 1897, are entitled to allotments, not because they are Indians or recognized as Indians of the tribe, but because of the foregoing act. The act provides for such allotment when the mother 'is at this time, or was at the time of her death, recognized by the tribe.'
>
> "While the mother, a Chehalis, has not been recognized by the Quinaielt and Quillehute tribes, there could have been no further recognition of her by the Chehalis under the circumstances and condition of that tribe, being without tribal organization."

The objection urged in this case by counsel for respondent has been answered under Question Two, *infra,* to which reference is here made.

CASE No. 154.

This is the case of Mary Frances Provoe *et al.,* and is dealt with in respondent's brief, pp. 38, 46-9. The finding of the trial court appears in the record, pp. 364-375, to which the attention of this Court is invited.

The trial court found as a fact that Mary Frances, principal petitioner, and through whom all other petitioners claim, was then about 74 years of age, having been born before the treaty to a full-blood Chehalis Indian woman and a white man; that she was born and had since lived in tribal environment; that in 1870 she married David Provoe, whose mother was a Stikine Indian from Alaska who had been adopted by the Cowlitz tribe; that David Provoe had been adopted by the Cowlitz tribe, and always recognized as a Cowlitz Indian; that all of the seven children of Mary Frances and David Provoe, petitioners herein, were born in the Indian country in tribal environment and have ever since lived. Counsel for respondent concede (Brf., 46) that five of petitioners reside on the Chehalis Reservation, considered by the trial court in its opinion (R., 370). The trial court further held (R., 375) that "Mary Francis, a Chehalis Indian woman by blood, by her marriage in 1870, before the Executive Order, to David Provoe, a Cowlitz, took his status, that is, by her marriage she became a Cowlitz, and their children should be classed as Cowlitz". But the court held that whether the children were classed as Chehalis or Cowlitz Indians, they were entitled to allotments. The attention of this Court is again invited to the fact that the remnant Cowlitz tribe had at the time of the Executive Order been merged with the Chehalis tribe, the Cowlitz Indians in 1885 being no longer known by that name (Bu. Am. Ethn., Bul. 30, Pt. 1, p. 355). The Cowlitz tribe having been absorbed by the Chehalis tribe, and having lost its identity in 1885, the mother, Mary Frances, if her status was

changed by her marriage in 1870 to that of a Cowlitz, resumed her original status as a Chehalis Indian and all of her children occupied the status of Chehalis Indians.

The appellate court below (R., 667) held that a Lower Chehalis Indian was entitled to an allotment, but that an Upper Chehalis or Cowlitz Indian was not, and as the trial court did not specifically find Mary Frances Provoe to be either an Upper or Lower Chehalis Indian, it reversed that part of the decree relating to her, and remanded the case (R., 668) for further inquiry by the trial court.

The appellate court below (R., 668-9) reversed that part of the decree of the trial court, decreeing the seven children entitled to allotments, on the ground that the children born of the marriage of Mary Frances to David Provoe took the status of their father, an adopted Cowlitz Indian, and the son of a white man, and as such acquired no rights.

Counsel for respondent (Brf., 46-9) apparently concede that Mary Frances and her children are entitled to allotments if under the Act of March 4, 1911, and the Executive Order, Chehalis and Cowlitz Indians are entitled to allotments, and further if residence on the Quinaielt Reservation is not a condition precedent.

Counsel for petitioners have fully discussed the right of Chehalis and Cowlitz Indians to allotments under Question One, *infra;* their rights to allotments without first establishing residence on the reservation under Question Three, *infra,* and the non-application of the Act of June 7, 1897, to the children of an Indian woman and white man born in tribal environment

where the marriage occurred prior to 1888 under Question Two, *infra*, which need not again be repeated and to which the attention of this Court is invited.

Sixth Question.

> "Whether 'recognition' of an Indian, not of Quinaielt blood, by the Quinaielt Indians as a member of the tribe, entitles such Indian to allotment upon the Quinaielt Reservation."

This question is dealt with in respondent's brief, pp. 55-7.

The appellate court below, and counsel for respondent here, have evidently misconceived the position of counsel for petitioners with reference to basic rights to allotments. Their position is clearly stated in the second paragraph under the heading "Second Question", *infra*, to which reference is here made. Adoption records and other evidence showing, or tending to show, formal recognition by the Departmental officers of petitioners' rights to allotments were introduced in the record and considered by the court. These records have some evidentiary value for the purpose for which they were introduced. The confusion arose by the adoption of an erroneous practice by the Department, of requiring the adoption by the Indians on the Quinaielt Reservation, as a condition precedent to an allotment right, of members of the Chehalis, Chinook and Cowlitz tribes. It appears that this practice obtained in all cases where Indians were admittedly members of the Chehalis, Chinook and Cowlitz tribes. This practice was unauthorized by law.

It is the contention of counsel for petitioners that they are possessed of the same basic allotment rights

possessed by all Chehalis, Chinook and Cowlitz Indians, allotted on the Quinaielt Reservation, and that their denial by the Departmental officers on the ground that they had not been adopted by the Indians on the Quinaielt Reservation or on other grounds was unjustifiable.

The Quinaielt Reservation was enlarged by the Executive Order for the sole purpose of taking care of the Chehalis, Chinook, Cowlitz and other Indians. By the treaty a reservation sufficient for the wants of the Quinaielts and Quillehutes was to be set aside. The United States bought and paid for all the ceded land. In 1863 the reservation provided for by the treaty was surveyed and embraced only 10,000 acres. By the Executive Order it was enlarged to 224,000 acres, the 214,000 additional acres being added from the land purchased by the United States, and in which the Quinaielt and Quillehute tribes had no claim of right.

CONCLUSION.

For the above and foregoing reasons counsel for petitioners respectfully submit that the decrees of the appellate court below should be reversed in all cases and the decrees of the trial court affirmed.

Respectfully submitted,

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